Supreme Court, U. S.
FILED
JUL 29 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-1668

ANDREW SCHEPICI,
JOSEPH MASTRULLO,
JOHN BRADANESE, and
CHARLES PALAZZOLO,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Andrew Schepici, Joseph Mastrullo, John Bradanese and Charles Palazzolo, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on June 30, 1977.

Opinion Below

The Opinion of the Court of Appeals for the First Circuit has not yet been published in the official reports. A copy of the Opinion is attached hereto as Appendix A. (App. 13-25).

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on June 30, 1977. No petition for rehearing was filed because of the limitation of such petitions to new matters under Local Rule 15 of the First Circuit.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1) to review the judgment of a Court of Appeals by writ of certiorari.

Question Presented for Review

I. Whether or Not the Government Failed To Comply With the Relevant Provisions of 18 U.S.C. §2518 (1)(c), Requiring That Affidavits, Applications, and Orders Used To Secure Permission For Electronic Surveillance Set Forth With Sufficient Particularity That Investigative Procedures, Other Than Electronic Surveillance, Were Tried and Failed or Reasonably Appeared Unlikely To Succeed if Tried or Were Too Dangerous?

Statutes Involved

18 U.S.C. §§2, 371, 1955 and 2518 are involved. The text of those sections is attached hereto as Appendix B. (App. 26-36).

Statement of the Case

Petitioners Schepici, Mastrullo, Palazzolo, and others were charged with operating an illegal gambling business and with conspiracy to commit the substantive offense in violation of 18 U.S.C. §§2, 371 and 1955. Petitioner Bradanese was charged with a substantive violation only. After a non-jury trial on stipulated facts, each petitioner was convicted of one count of conducting, managing, supervising, owning and directing a bookmaking business, in violation of 18 U.S.C. §1955.

The convictions arose in the context of four indictments returned together on June 27, 1975. The indictments were based on evidence derived from a series of wiretaps conducted pursuant to three court authorizations. The three wiretap orders, issued on December 4, 1974, December 17, 1974, and January 17, 1975, were based on affidavits submitted by F.B.I. Agent Thomas J. Daly.

Various defendants named in the four indictments brought pre-trial motions to suppress the direct and derivative fruits of the three sets of wiretaps. The motions were denied after an evidentiary hearing.

The gravamen of the suppression motions was that the affidavits in support of the Government's applications for wiretap orders contained the following boilerplate allegations:

> "Normal investigative procedures have failed to gather evidence necessary to sustain prosecution for violations of these offenses and appears unlikely to succeed if tried further."

Special Agent Daly also alleged in each of the three affidavits:

"While informant information and physical surveillances have established a reasonably consistent pattern of conduct and associations which point to the conducting of an illegal gambling business, these observations do not amount to sufficient proof of a violation of Title 18, United States Code, Section 1955. While execution of search warrants involving the individuals and locations relevant to this investigation may well produce gambling related paraphernalia, it is my experience that gambling records are often sketchy in nature, often contain code names, and rarely establish a provable connection between all the participants in the illegal gambling business. None of the informants cited above is willing to testify as to information they have imparted for fear of their personal safety."

Agent Daly's affidavits contain nothing further on the subject of normal investigative procedures beyond the following statement in the first affidavit:

"Inasmuch as the telephone facilities set forth in this affidavit are all situated in private premises located at 170 Linden Street, Everett, 29 Sagamore Avenue, West Medford, and 15 Brookford Street, Cambridge, Massachusetts, respectively, it is impossible for law enforcement officers to observe the gambling activities at these locations."

At the hearing on the motion to suppress, Agent Daly stated that "a great number of," if not most, gambling operations are carried out in private residences.

He further admitted that contrary to the allegations in his affidavits, the following investigative procedures were not employed: (a) Prior to electronic surveillance, no warrants were sought for persons or places involved; (b) Payment of monies to informants to testify was not offered;

(c) Immunity for testimony of informants was not offered; (d) Protective custody for informants was not offered; (e) No telephone conversation between an informant and a target of the investigation was monitored; (f) Informants were not summoned before the grand jury then in session; (g) Other persons to whom telephone services were listed were neither interviewed, summoned before a grand jury, offered immunity, protective custody, or money for testimony; (h) Persons whose names came up as connected to the investigation were neither interviewed, summoned before a grand jury, offered immunity, protective custody or money for testimony; (i) Local authorities were not sought to ascertain whether surveillances were conducted as to the persons or places involved in the investigation.

The petitioners' appeal to the United States Court of Appeals for the First Circuit concerned itself with various issues, among them being whether the trial court erred in denying petitioners' motions to suppress the evidence acquired during the three electronic surveillances for the reason that the Government failed to comply with 18 U.S.C. §2518(1)(c), which requires that an application for a wiretap order include "a full and complete statement as to whether or not investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Reasons for Granting the Writ

A. The Opinion of the Court of Appeals For the First Circuit Is Contrary to the Intent of Congress in Passing 18 U.S.C. §§2518(1)(c) and (3)(c).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides that judicial approval for wiretapping "may not be given except upon compliance with stringent conditions." *Gelbard* v. *United States,* 408 U.S. 41, 46 (1972). In enacting Title III, Congress "evinced the clear

intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation." *United States* v. *Giordano*, 416 U.S. 505, 515 (1974).

Specifically, 18 U.S.C. §§2518(1)(c) and (3)(c) require an application for authority to make any wire interception to state, and the judge authorizing any such wire interception to find, that normal investigative procedures have either failed or appear unlikely to succeed. In *United States* v. *Kahn*, 415 U.S. 143, 151 (1974), this Court refers to the legislative history and Congressional intent behind these provisions.

With respect to §2518(1)(c), the Senate Report indicated:

> "Subparagraph (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous. This requirement is patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary. . . . The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search wararnts, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. See *Giancana* v. *United States*, 353 F.2d 921 (7th) *certiorari denied*, 86 S. Ct. 437, 382 U.S. 959 (1965); *New York* v. *Saperstein*, 2 N.Y. 2d 210, 140 N.E. 2d 252 (1957). What the provision envisions is that the showing be tested in a practical and common-sense fashion. Compare *United States* v. *Ventresca*, 85 S. Ct. 741, 380 U.S. 102 (1965)."
>
> S. Rep. No. 1097, 90th Cong., 2d Sess., 101, U.S. Code Cong. & Admin. News, 1968, p. 2112, at 2190.

Section 2518(3)(c) authorizes a Federal judge to enter an ex parte order authorizing or approving the interception of wire or oral communications. What the judge must determine before he can issue an order, based on the facts submitted to him, is specified in subparagraphs (a) through (d). The legislative history then makes the following observation with respect to these requirements:

> "Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity (*Berger* v. *New York*, 87 S. Ct. 1873, 388 U.S. 41, 58-60 (1967); *Katz* v. *United States*, 88 S. Ct. 507, 389 U.S. 347, 355-356 (1967))."
>
> S. Rep. No. 1097, 90th Cong., 2d Sess., 101, U.S. Code Cong. & Admin. News, 1968, p. 2112 at 2191.

It is clear that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was the reaction of Congress to an awakening realization that our form of government will not permit an intrusion by electronic devices into the privacy of our citizens without the most careful judicial scrutiny and supervision. Although recognizing that the sophistication of modern-day crime and the employment by those who seek to break the law of telephonic communication requires that law enforcement be given an equally effective tool, with which to uncover such crime, Congress nonetheless displayed its concern with potential abuse by

insisting that every application for electronic surveillance contain:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."
> 18 U.S.C. 2518(1)(c).

Further, a Court order permitting electronic surveillance may be authorized only if a United States District Court Judge or a United States Court of Appeals Judge finds that

> "Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."
> 18 U.S.C. 2518(3)(c).

In the opinion below, the Court of Appeals, quoting *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12 (1974), and *United States* v. *Scibelli*, 549 F.2d 222, 226 (1st Cir. 1977), *cert. denied*, 45 U.S.L.W. 3787 (June 7, 1977), observed that Section 2518(1)(c) was not designed to force the Government to exhaust all other procedures before resorting to wiretapping, but was designed " 'to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.' " (App. 18).

However, rejecting petitioners' contention that the affidavits were insufficient, the Court of Appeals merely noted that the applications were preceded by a three month investigation which included the gathering of information from informants who were unwilling to testify. (App. 19). In the affidavits, Agent Daly stated that the informants

were unwilling to testify for fear of their personal safety. Daly later testified that one informant was unwilling, but he did not know precisely why. The Court of Appeals, in footnote 4, dismissed the argument that in such a situation, at the very least, immunity or protective custody should have been considered. (App. 20-21).

The Government's unqualified statement that normal investigative procedures "have failed" left the issuing court with no choice but to conclude that the Government had at least attempted to use normal techniques before seeking wiretap authorizations. See 18 U.S.C. §2518(1)(c). The affidavits create the impression that such other efforts were made, but with little success. Agent Daly's testimony at the hearing on the motion to suppress demonstrated that this impression was, in fact, false. (See Statement of the Case, *supra*, at 4-5).

What is revealed in the opinions below is that token compliance with statutory norms can be substituted for the rigorous prerequisites which Congress promulgated. The picture is hardly that of law enforcement officials using wiretap authority "with restraint" and under "stringent conditions".

Petitioners agree with the Court of Appeals that the "statute does not require that the Government try every possible technique before resorting to wiretapping". (App. 21). However, contrary to the opinion of the Court of Appeals, in order to comply with Congressional intent, what is required is a detailed statement as to why certain normal investigative techniques are inappropriate for the particular matter under investigation. Only then can the judge before whom the application is brought make an independent judgment that a wiretap is necessary, and is not merely the path of least resistance for the Government.

B. A Wide Divergence of Opinion Exists Among the Several Circuit Courts of Appeals Concerning the Extent To Which the Government Must Aver Its Exhaustion of Normal Investigative Techniques and the Extent To Which It Actually Must Pursue Alternative Means to Electronic Surveillance.

In the opinion below, the Court of Appeals devoted little attention to petitioners' argument that more than a conclusionary affidavit is necessary for compliance with 18 U.S.C. §2518(1)(c). Rather a citation to a prior opinion, *United States* v. *Scibelli,* 549 F.2d 222 (1st Cir. 1977), *cert. denied*, 45 U.S.L.W. 3787 (June 7, 1977) seemed to suffice.

The position of the First Circuit now appears to be one of permissive deference to generalizations offered by the Government. In *United States* v. *Scibelli, supra,* the Circuit Judges stated that mere conclusions alone would cause them some "uneasiness" and the question of the sufficiency of the affidavit "would be closer". 549 F.2d at 227. However, the cursory treatment of the issue in petitioners' case reveals that mere conclusions may suffice.

This places the First Circuit in close alliance with the "pragmatic" approach adopted by the Third Circuit in *United States* v. *Armosida,* 515 F.2d 29 (3rd Cir. 1975), *cert. denied,* 423 U.S. 858 (1976), and *United States* v. *Vento,* 533 F.2d 838 (3rd Cir. 1976). It could also be seen to be in agreement with the Seventh Circuit which believes that "the government's burden of establishing its compliance with [subsection 2518(1)(c)] is not great." *United States* v. *Anderson,* 542 F.2d 428, 431 (7th Cir. 1976). This position raises a serious question with regard to Congressional intent.

At the time of application for certiorari in *United States* v. *Scibelli, supra,* at the opposite end of the spectrum was

the position of the Court of Appeals for the Ninth Circuit, as enunciated in *United States* v. *Kalustian,* 529 F.2d 585 (9th Cir. 1976). The Ninth Circuit stated that an application must demonstrate why traditional investigative techniques were insufficient in a particular case so a judge "can determine whether other alternative investigative procedures exist as a viable alternative." 529 F.2d at 590.

Today, the position of the Ninth Circuit is even stronger which makes the treatment of defendants in the various circuits even more disparate. In *United States* v. *Spagnuolo,* 549 F.2d 705 (9th Cir. 1977), the Court mandated that an affidavit reveal which normal investigative techniques have been employed in a good faith effort. Or, if such techniques are not employed, a factual showing must be made, independent of the agent's assertions of experience, revealing "that under the particular circumstances of the case the employment of such techniques 'reasonably appear unlikely to succeed if tried or to be too dangerous.'" 549 F.2d at 710.

Where the First Circuit permits an issuing judge to take shortcuts and consider that the crime is "essentially a telephone crime" (App. 19), the Ninth Circuit demands time and consideration:

> It is no doubt true that experienced agents at the outset of an investigation can anticipate with a fair degree of accuracy whether ordinary techniques will fail or prove to be 'too dangerous.' To delay the wiretap order while ordinary techniques are employed or to undertake to educate a district judge to enable him to appreciate their level of experience no doubt appears to such agents as a waste of time and resources. Their perception may be accurate, but Congress has deprived it of decisive influence. The particularized showing here described is necessary. The district

judge, not the agents, must determine whether the command of Congress has been obeyed.

549 F.2d at 710-711.

The obvious purpose of 18 U.S.C. §2518 is to secure the right of an individual citizen to be free of unwarranted and unjustified intrusion by wiretapping. A determination by this Court as to the particulars which must be presented to a judge before a wiretap order can issue is necessary to protect citizens by ensuring uniformity in the application of 18 U.S.C. §§2518(1)(c) and (3)(c) among the several circuits.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted: to determine whether the opinion of the Court of Appeals for the First Circuit is contrary to the intent of Congress in passing 18 U.S.C. §§2518(1)(c) and (3)(c); and to resolve the inconsistent opinions of the several Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1178

UNITED STATES OF AMERICA,
APPELLEE,
v.
VICTOR SANTARPIO, a/k/a "LEFTY",
DEFENDANT, APPELLANT.

No. 76-1179

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOSEPH S. MASTRULLO,
DEFENDANT, APPELLANT.

No. 76-1180

UNITED STATES OF AMERICA,
APPELLEE,
v.
THOMAS HURLEY,
DEFENDANT, APPELLANT.

No. 76-1181

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES PALAZZOLO,
DEFENDANT, APPELLANT.

No. 76-1182

UNITED STATES OF AMERICA,

APPELLEE,

v.

PHILIP CALI,

DEFENDANT, APPELLANT.

No. 76-1183

UNITED STATES OF AMERICA,

APPELLEE,

v.

ANDREW SCHEPICI,

DEFENDANT, APPELLANT.

No. 76-1198

UNITED STATES OF AMERICA,

APPELLEE,

v.

RICHARD SMITH,

DEFENDANT, APPELLANT.

No. 76-1199

UNITED STATES OF AMERICA,

APPELLEE,

v.

HARRY F. HAMPERIAN,

DEFENDANT, APPELLANT.

No. 76-1200

UNITED STATES OF AMERICA,

APPELLEE,

v.

ALBERT F. BRUUN,

DEFENDANT, APPELLANT.

No. 76-1201

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN BRADANESE,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Martin G. Weinberg, Joseph J. Balliro, and *Gerald Alch,* with whom *William J. Cintolo, Oteri & Weinberg, Joan C. Schmidt, Jeanne Baker, David Fine,* and *Rosenberg, Baker & Fine* were on brief for appellants in case numbers 76-1179, 76-1181, 76-1183 and 76-1201.

John J. Sylvester, by appointment of the Court, for appellant in case number 76-1182.

Alan R. Hoffman, by appointment of the Court, with whom *Kaplan and Flannery,* was on brief, for appellant in case number 76-1178.

Francis J. O'Rourke, by appointment of the Court, and *Maloney, Williams & Baer* appearing for appellant in case number 76-1200.

William J. Carr appearing for appellant in case number 76-1199.

Eugene K. Giroux appearing for appellant in case number 76-1198.

Robert Y. Murray, by appointment of the Court, and *Moulton & Looney* appearing for appellant in case number 76-1180.

Frederick Eisenbud, Attorney, Department of Justice, with whom *James N. Gabriel,* United States Attorney, and *William G. Otis,* Attorney, Department of Justice, were on brief, for appellee.

June 30, 1977.

CAMPBELL, *Circuit Judge.* The ten appellants were named in four indictments[1] which charged them, and others, with

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[1] The indictments charged appellants with having "conducted, managed, supervised, owned, and directed an illegal gambling busi-

operating an illegal gambling business and with conspiracy to commit that offense in violation of 18 U.S.C. §§ 1955 and 2. Following a jury-waived trial, all were convicted on one count of conducting an illegal gambling business.

The Government's primary evidence consisted of stipulations of fact including transcripts of court authorized wire interceptions of telephone conversations conducted between December 19, 1974 and February 3, 1975. An FBI bookmaking expert through stipulation and testimony explained how a bookmaking business works and gave his opinion based on the other evidence that each of the defendants was part of one gambling enterprise. The Government also introduced gambling paraphernalia seized in warrant-authorized searches of several locations used in defendants' bookmaking operations. Seen in the light most favorable to the Government, this evidence revealed a gambling business unified by the exchange of line and other gambling information and layoff bets between bookmakers. Briefly the stipulated facts were as follows.

Thomas Hurley owned a bookmaking business the central office of which was managed by Victor Santarpio

ness . . . (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining in substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction, and ownership, and (4) being in violation of Massachusetts General Laws, Chapter 271, Sections 7, 17 and 17(a)", all in violation of 18 U.S.C. § 2255 and 2. Four appellants, Cali, Hamperian, Smith and Santarpio, argue that the indictments are duplicitous and should have been dismissed because each of the cited sections of Mass. Gen. Laws, c. 271 includes numerous separate state crimes and appellants were thus deprived of notice of what allegations they had to prepare to meet. The argument is without merit. The indictments adequately set out the elements of the federal crime; appellants were not misled nor prejudiced. Fed. R. Crim. P. 7(c)(3). *See United States* v. *Morrison*, 531 F.2d 1089, 1094 (1st Cir. 1976). We need not decide whether it would have been enough to state only that the operation was being carried out "in violation of state law". *Cf. Babb* v. *United States*, 218 F.2d 538, 540 (5th Cir. 1955).

assisted by an office worker, Albert Brunn. Santarpio received and accepted layoff wagers on sports from Andrew Schepici, Joseph Mastrullo, Philip Cali, Richard Smith and Harry Hamperian. He also received and accepted layoff wagers on horses from Schepici. Santarpio exchanged line information on sporting events with Schepici and Mastrullo and received from Schepici line information which had been received from Charles Palazzolo. John Bradanese was an office worker for Mastrullo.

Appellants, either in combination or individually, make numerous assignments of error. They challenge the indictments, the legality of the wiretaps, the sufficiency of the evidence, and, in one case, a condition of probation that was imposed. Because all challenge the legality of the three wiretap orders, we address that question first.

I

The wiretap orders were issued on December 4, 1974, December 19, 1974 and January 17, 1975, each on the basis of an application by Special Attorney Jeremiah T. O'Sullivan[2] and an affidavit by FBI Agent Thomas J. Daly. The telephone company was unable to effect the first taps and no evidence was obtained from the December 4 order. The information gained from the other wiretaps led to search warrants and the seizure of bookmaking paraphernalia. The district court denied appellants' motions to suppress the intercepted communications and derivative evidence.

Appellants assert that the applications were defective because they failed to demonstrate the inadequacy of nor-

[2] There is no merit in appellants' argument that the indictments should have been dismissed because they were not signed by the United States Attorney. Mr. O'Sullivan is "an attorney for the government" as required by Fed. R. Crim. P. 7(c). *See United States* v. *Morrison*, 531 F.2d 1089 (1st Cir. 1976). Insofar as his sole signature may have failed to comply with the Attorney General's Guidelines Governing Interrelationships Between Strike Forces and U.S. Attorney's Offices (reproduced in *In Re Persico*, 522 F.2d 41, 70 (2d Cir. 1975)) it is only of concern, if at all, to the Justice Department; appellants may not raise the issue.

mal investigative procedures, 18 U.S.C. § 2518(1)(c) and failed to establish probable cause that five or more persons were involved in an illegal gambling business, 18 U.S.C. § 2518(3)(a).[3] Appellants further argue that the identity of three anonymous informants should have been revealed to the defendants or, alternatively, to the court *in camera*.

In *United States* v. *Schibelli*, 549 F.2d 222, 226 (1st Cir. 1977), *cert. denied* — U.S. — (June 6, 1977), we said that our role on review was "not to make a *de novo* determination of sufficiency . . . but to decide if the facts set forth in the application were minimally adequate to support the determination made." We further observed that section 2518(1)(c) was not designed to force the Government to exhaust all other investigative procedures before resorting to wiretapping but rather serves "to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *Id. quoting United States* v. *Kahn*, 415 U.S. 143, 153 n.12 (1974). We have reviewed the applications and affidavits which led to the wiretaps in this case and, reading them in "a practical and commonsense manner", *United States* v. *Scibelli, supra*, 549 F.2d at 226, we cannot say that the district court erred in finding them to comply with the requirement of "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous", 18

[3] Another argument made by Santarpio and adopted by Bruun, Hamperian and Smith, is quickly disposed of. Since oral argument was heard in this case the Supreme Court has stated that the

> "provisions for mandatory and discretionary inventory notice [in 18 U.S.C. § 2518(d)] . . . satisfy constitutional requirements. See *Katz* v. *United States*, 389 U.S. 347, 355-56 and n.16 (1967); *Berger* v. *New York*, 388 U.S. 41, 60 (1967)."

United States v. *Donovan*, — U.S. —, — n. 18 (January 18, 1977). *See generally United States* v. *Harrigan*, — F.2d — (1st Cir., June 20, 1977).

U.S.C. § 2518(1)(c). The applications show that they were preceded by a three month investigation which included surveillance and the gathering of information from informants. None of the informants was willing to testify for the Government. Agent Daly explained that although a pattern of conduct which reasonably suggested an illegal gambling business had been established, this would not be sufficient to convict under 18 U.S.C. § 1955. In deciding if other techniques were or were not promising, the court was entitled to take account of the fact that the alleged crime was essentially a telephone crime. *See United States* v. *Schibelli, supra*, 549 F.2d at 227; *United States* v. *Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *In re Dunn*, 507 F.2d 195, 197 (1st Cir. 1974).

Appellants laboriously analyze the contents of the first affidavit suspect by suspect and conclude that there was insufficient probable cause established with respect to four of the seven named suspects. Because the federal crime of conducting a gambling business requires that five or more individuals be involved, this insufficiency is said to be fatal to the affidavit. The second application is similarly dissected and is additionally attacked as insufficient because, it is argued, the requirements of 18 U.S.C. § 2518(1)(e) should have been, but were not met, and the demonstration of probable cause was not fresh. No direct attack is made on the third application which was largely based on evidence derived from implementation of the second wiretap order. It is argued, however, that if the second application violated the statute, information therefrom must be suppressed, including the derivative evidence resulting from the third tap.

The short answer to much of the foregoing is that it calls for reading the affidavits in a hypertechnical manner. They should not be so read. *See United States* v. *Ventresca*,

380 U.S. 102, 108-09 (1965). A commonsense interpretation reveals that there was probable cause as to each of the persons named in each of the wiretap applications. Indeed, one reaches the same conclusion even if the affidavits are read in the refined manner urged. We find, moreover, no fatal absence of reliability in the statements made by gamblers to the informants. These admissions against penal interest by confessed bookmakers concerning gambling operations of which they were a part were certainly entitled to weight. *See United States* v. *Harris,* 403 U.S. 573, 583-84 (1971) (plurality opinion); *United States* v. *Bowser,* 532 F.2d 1318, 1321 (9th Cir. 1976); *United States* v. *Carmichael,* 489 F.2d 983, 986-87 (7th Cir. 1973) (*en banc*); Fed. R. Evid. 804(b)(3). Reasonably viewed, we find none of the statements to be "hopelessly vague", as alleged, nor insufficiently fresh. We reject the contention that collecting debts from delinquent accounts and settling with bettors does not show one to be an integral part of the conducting of business within section 1955. *See, e.g., United States* v. *Sacco,* 491 F.2d 995, 1002-03 (9th Cir. 1974); *United States* v. *Smaldone,* 485 F.2d 1333, 1351 (10th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). Finally, the second application was not an extension of the first but a new request covering phones different from those sought to be tapped pursuant to the first order. As such it complied with the requirements of 18 U.S.C. § 2518(1)(e). *See United States* v. *Florea,* 541 F.2d 568, 576 (6th Cir. 1976), *cert. denied,* — U.S. — (March 28, 1977).

The district court had no reason to require that the informants be identified. There was probable cause to issue the wiretap orders and there were no material misrepresentations in the affidavits;[4] moreover, the district

[4] We find no merit in appellants' contention that Agent Daly's affidavits were infected by serious misrepresentations. Assuming that Agent Daly knew that informant number three was unwilling to testify but not precisely why, and that to this extent he misspoke when he said that none of the informants was willing to testify "for fear of his personal safety" the error did not compel a finding of bad faith, nor was it of major materality. As the Government was not obliged to pursue with its informants the possibility of protective custody, *United States* v. *Schibelli,* 549 F.2d 222, 228 n.5, *cert. denied,* — U.S. — (June 6, 1977), its failure to do so did not undermine the representations in the affidavit.

Similarly there is no merit in the claim that the affidavits were fatally undermined because alternative investigative measures were not exhaustive enough. The statute does not require that the Government try every possible technique before resorting to wiretapping. *See infra.*

court heard the testimony of Agent Daly at the hearing on the motions to suppress and apparently was satisfied that the information received from the informers was reliable and the informants credible. *See McCray* v. *Illinois,* 386 U.S. 300, 304 (1967) *quoting Aguilar* v. *Texas,* 378 U.S. 108, 114 (1964). Not only was there no requirement that the informants' identities be revealed to appellants, *see McCray* v. *Illinois, supra,* 386 U.S. at 311-12 & n.11, but the court had no reason based either on Agent Daly's testimony or on the affidavits themselves to question the reliability of the informants. *In camera* identification was thus not required and the cases cited by appellants, *United States* v. *Freund,* 525 F.2d 873 (5th Cir. 1976); *United States* v. *Anderson,* 509 F.2d 724 (9th Cir. 1974), *cert. denied,* 420 U.S. 910 (1975); *United States* v. *Hurse,* 453 F.2d 128 (8th Cir. 1972), *cert. denied,* 414 U.S. 908 (1973), are simply inapposite.

Appellants' remaining arguments that the wiretap evidence should have been suppressed are similarly without merit.

II

Palazzolo, Cali and Hamperian argue that the Government's evidence was insufficient to establish that each of them conducted an illegal gambling business in violation of 18 U.S.C. § 1955. In reviewing these assertions, we con-

sider evidence in a light most favorable to the Government, *United States* v. *Doran*, 483 F.2d 369, 372 (1st Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

We start with Palazzolo. Intercepted during the third wiretap, he contends that his laying off of bets with Shepici was not enough to establish that he was a participant in the larger Santarpio operation.[5] He argues that the evidence shows that Palazzolo disseminated line information to Schepici only twice, and that the amount of business Schepici laid off to Palazzolo was "miniscule". In fact, Palazzolo furnished to, and accepted from, Schepici layoff wagers on numbers and horses, and, on at least one occasion, Schepici then laid off to Santarpio bets he had received from Palazzolo. Schepici discussed with Palazzolo settlement of his account and, on a number of occasions, furnished line information on sports to Schepici who, on one occasion, in turn furnished the line to Santarpio. It was not necessary to show that Palazzolo knew that he was aiding Santarpio and others beside Shepici. *See United*

[5] During the second set of wiretaps mention was made in the course of an intercepted conversation of "Freestone". Agent Daly, in his affidavit in support of the third set of taps, stated that he knew "Freestone" to be Palazzolo's nickname. Palazzollo was, however, not named as one the Government had probable cause to believe to be committing the offenses for which the second tap was sought, *see* 18 U.S.C. § 2518(1)(b)(iv), although he was subsequently intercepted during the third set of wiretaps. While not arguing that the failure to identify him was an effort to mislead the district court as to whether there was probable cause to tap, Palazzollo urges that the Government's purported failure to comply with section 2518(1)(b)(iv) should lead to the suppression of the evidence against him.

It is true "that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target phone." *United States* v. *Donovan*, ___ U.S. ___, (January 18, 1977), but, where, as here, "the application provided sufficient information to the issuing judge to determine that the statutory preconditions were satisfied", *id.* at ___, the interceptions are not unlawful and the evidence will not be suppressed. *Id.* at ___.

States v. *DiMuro*, 540 F.2d 503, 508 n.5 (1st Cir. 1976), *cert. denied*, ___ U.S. ___ (1977) *citing United States* v. *Brick*, 502 F.2d 219, 224 (8th Cir. 1974).

The stipulated evidence against Cali was that he received line information on sporting events from, furnished layoff wagers on sports and horses to, and discussed the settlement of his account with, Santarpio. Furthermore, Cali discussed with Mastrullo the fact that his, Cali's, 'make-up' on sports to Santarpio (that is, the amount owed) was $25,000. Cali contends that the evidence simply does not show a sufficiently regular and consistent type of connection with Santarpio to fuse Cali into the overall operation. The fact, however, that Cali gave line information to, and accepted layoff bets from Santarpio, is basis enough for the conviction; it could be determined that Cali's participation was necessary and useful to Santarpio's gambling enterprise. *See United States* v. *DiMuro, supra,* 540 F.2d at 508.

The stipulated evidence against Hamperian was that he furnished layoff wagers on numbers to Santarpio and Bruun and discussed the settlement of his account on numbers, horses and sports with Santarpio. He also discussed with Santarpio his "commission and his pay-off of 'hits' on numbers to customers of the business" and his reimbursement by Thomas Hurley of monies paid out. The Government's expert concluded from this that Hamperian was part of the unified gambling business involving the other defendants. To be sure, he did not describe and explain the relevancy of the factors upon which he rested his opinion; on the other hand, Hamperian chose not to cross-examine the expert, although offered the opportunity. On cross-examination, Hamperian could have discovered the basis for the ultimate opinion, and attempted to show its inadequacy. Except for reserving an objection to the characterization of his bets as layoff wagers rather than

personal bets, Hamperian did nothing to cast doubt on the validity of the opinion, *see* Fed. R. Evid. 705.[6] Under the circumstances, the court was entitled to credit the expert's conclusion. Hamperian's contention that he did not know the identity of Santarpio and the others does not bear on the sufficiency of the evidence necessary to convict Hamperian under section 1955. *See United States* v. *DiMuro, supra,* 540 F.2d at 508 n.5.

III

Hamperian was sentenced to six months probation "with special conditions of probation that defendant pay a fine of $1500 and pay attorney fees during the probationary period at a rate to be determined by the probation department." Hamperian's trial counsel was court appointed, and he contends that the special condition requiring repayment of attorney's fees exceeded the court's powers.

The district court was entitled to place Hamperian on probation "upon such terms and conditions as the court deems best" and it could condition probation on "a fine in one of several sums." 18 U.S.C. § 3651. That authority was sufficient to embrace this sort of condition which, if Hamperian is not indigent, might be thought to bear "a reasonable relationship to the treatment of the accused and the protection of the public", *see, e.g., United States* v. *Pastore,* 537 F.2d 675, 681 (2d Cir. 1976), *quoting United States* v. *Alarik,* 439 F.2d 1349, 1351 (8th Cir. 1971). However, the condition cannot be enforced so as to conflict with Hamperian's sixth amendment rights; if Hamperian is unable to pay the fees, revocation of probation for nonpayment would be patently unconstitutional. *See Tate* v. *Short,* 401 U.S. 395 (1971); *Williams* v. *Illinois,* 399 U.S. 235 (1970).

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[6] Rule 705 adopts the recent trend away from use of the hypothetical question. Notes of Advisory Committee on Proposed Rules, 28 U.S.C. Rule 705; *see* McCormick's Handbook of the Law of Evidence § 14 at 31 and § 16 at 37 (2d ed. 1972). Rule 705 was in force at the time of appellants' trial in March 1976.

In *Fuller* v. *Oregon,* 417 U.S. 40 (1974) the Supreme Court upheld a state sentence in which the defendant was placed on probation conditioned, *inter alia,* on his payment of legal fees. The Supreme Court found that under Oregon's recoupment statute there would be adequate safeguards for indigents. Recoupment was necessary only when a party was able to pay or where payment would not constitute manifest hardship. *Id.* at 53. Revocation of probation for failure to pay would conform to these standards, the Court reasoned, and thus would not impermissibly discriminate on the basis of wealth, there being no constitutional prohibition against imprisonment for nonpayment of a fine by one who has the necessary financial means. *Id.* at 53 n.12 *quoting Tate* v. *Short, supra,* 401 U.S. at 400.

The federal recoupment statute, 18 U.S.C. § 3006A(c) and (f) provides that whenever a magistrate or court finds that funds are available for payment from or on behalf of a person furnished representation, it may, "as the interests of justice may dictate", direct payment to the appropriate parties. Payment, however, may not be directed without a finding that the funds are available. *See United States* v. *Bursey,* 515 F.2d 1228, 1236 (5th Cir. 1975). *See generally United States* v. *Kelly,* 467 F.2d 262, 266 (7th Cir. 1972), *cert. denied,* 411 U.S. 933, *rehearing denied,* 412 U.S. 923 (1973). So long as it is understood that the special condition of probation may only be enforced with proper regard to the question of Hamperian's ability to pay, and not otherwise, we see no difficulty. *Cf. Fuller* v. *Oregon, supra,* 417 U.S. at 53 n.12; *Tate* v. *Short, supra. See also* ABA Standards Relating to Probation § 3.2(d) (Approved Draft 1970). Hamperian makes no claim on appeal that he is unable to pay; if that is the case he should address himself in the first instance to the district court. *See generally United States* v. *Gerena,* — F.2d —, — n.10 (1st Cir. April 29, 1977).

Affirmed.

APPENDIX B

TITLE 18

CRIMES AND CRIMINAL PROCEDURE

Chapter 1 General Provisions

SECTION 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

Chapter 19. Conspiracy

SECTION 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment for such misdemeanor.

June 25, 1948, c. 645, 62 Stat. 701.

Chapter 95. Racketeering

SECTION 1955. PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more consecutive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure or forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

Chapter 119. Wire Interception and Interception of Oral Communications

Section 2518. Procedure for Interceptions of Wire or Oral Communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has

been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the

facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that —

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral

communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the

provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use of disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such

motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

Supreme Court, U. S.
FILED
NOV 15 1977
MICHAEL RODAK, JR., CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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JOHN BRADANESE, and
CHARLES PALAZZOLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 560 F. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1977. The petition for a writ of certiorari was filed on July 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the applications for orders authorizing electronic surveillance sufficiently established that other investigative methods were inadequate.

STATEMENT

Following a non-jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App. A).

The evidence at trial consisted of a lengthy stipulation of facts and a transcript of telephone calls intercepted pursuant to judicially authorized electronic surveillance conducted on telephone lines used by petitioners Mastrullo, Bradanese, and Schepici and co-defendants Santarpio and Bruun.[2] This evidence demonstrated that petitioners together conducted a gambling enterprise doing business in excess of $2,000 per day (see, *e.g.*, Stipulation II, IV, V, and VIII). The primary bookmaking business was owned and managed by co-defendants Hurley and Santarpio (Stipulation I, II). Petitioners Schepici, Palazzolo, and Mastrullo conducted their own operations, in the course of which they exchanged information with and made and accepted wagers from each other and their co-defendants (Stipulation IV, VI, VIII). Petitioner Bradanese was an employee of Mastrullo and assisted him in the enterprise (Stipulation IX).

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[1]Petitioners received the following sentences: Schepici, two years' imprisonment, of which 18 months was suspended, and two years of probation during which he must pay a fine of $5,000; Palazzolo, two years' imprisonment, of which 21 months was suspended, and 21 months of probation during which he must pay a fine of $5,000; Mastrullo, one year's imprisonment, which was suspended, and two years of probation during which he must pay a fine of $3,000; Bradanese, one year's imprisonment, which was suspended, and two years of probation, during which he must pay a fine of $500 (C.A. App. 161B-161E). "C.A. App." refers to Volume I of the Appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

[2]There were three sets of monitored conversations: The first interception, over telephone lines used by Santarpio and Bruun, was pursuant to Order No. 74-303-G and was conducted from December 19, 1974 through January 5, 1975 (Stipulation A, II, III). The other interceptions were pursuant to Order No. 75-19-M and were conducted from January 18, 1975, through February 3, 1975, over telephone lines used by Mastrullo and Bradanese, and from January 21, 1975, through February 3, 1975, over lines used by Schepici (Stipulation A, VIII, IX, IV). Palazzolo was heard talking to Schepici (Stipulation VI).

Petitioners' sole contention (Pet. 5-12) is that the application for electronic surveillance did not show in sufficient detail that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The supporting affidavits, however, belie this contention.

The requirements of 18 U.S.C. 2518 (1) (c) are satisfied if the application and its supporting affidavit, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provide a sufficient factual basis for the issuing authority to conclude that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Sklaroff*, 552 F. 2d 1156, 1159 (C.A. 5), petitions for certiorari pending, Nos. 77-164 and 77-169; *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8); *United States* v. *Scibelli*, 549 F. 2d 222, 226 (C.A. 1), certiorari denied, June 6, 1977 (No. 76-1212); *United States* v. *Armocida*, 515 F. 2d 29, 38 (C.A. 3), certiorari denied *sub nom. Gazal* v. *United States*, 423 U.S. 858. The applications in the present case provide such a factual basis.

In the affidavit accompanying the initial application, F.B.I. Agent Daly detailed the facts and circumstances surrounding the offense and the targets' participation.[3] The affidavit showed (C.A. App. 27-44) that the government's information up to that point derived from three months of visual surveillance, the use of three reliable informants, evidence seized (pursuant to a warrant) by state officers that implicated other members of the conspiracy, and state records that showed that at least five of the persons named by the informants had previously been convicted of gambling-related offenses. This cumulation of evidence, however, was not sufficient to insure that a violation of 18 U.S.C. 1955 could be proved at a trial, since the informants refused to testify out of fear for their personal safety (C.A. App. 42). While the visual surveillance supplied probable cause to believe that certain individuals were implicated, that surveillance could not provide evidence as to the bookmaking activities because they were carried on inside private homes (*id.* at 41). Moreover, in Agent Daly's experience, the use of search warrants would also be ineffective because gambling records often were sketchy, contained code names, and rarely established provable connections between all the participants in the illegal enterprise (*id.* at 41-42)—indeed, his experience was borne out in this particular case by the fact that after the seizure of evidence by state authorities only one individual was convicted (*id.* at 38-39). Finally, drawing on his four

[3]The initial application (C.A. App. 21) resulted in an order dated December 4, 1974, which was not implemented (Pet. App. 17). The affidavit supporting that order (C.A. App. 27-44) was incorporated by reference into the application for the December 19, 1974 order (C.A. App. 61), and both of the earlier affidavits were incorporated by reference into the final application (C.A. App. 89).

years' experience and involvement in over 100 gambling investigations, Agent Daly concluded that, because most of the activity occurred in private homes and by telephone, continued surveillance and other normal investigative techniques would be unsuccessful (C.A. App. 27, 41).

In the succeeding affidavits (C.A. App. 58-66, 87-99) Daly pointed out that in his experience persons engaged in illegal gambling frequently moved their base of operation in order to avoid detection, and that at least two suspects in this investigation had done so before. Daly also noted that the prior interception had revealed the involvement of other persons whose identities were as yet unknown to the government, and that continued electronic surveillance was necessary to establish the identities of these persons.

In sum, the facts detailed in the affidavits showed that alternate investigative procedures were first attempted and found to be ineffective. As the court of appeals correctly noted (Pet. App. 20-21 n. 4), the government was not required to offer the informants immunity or protective custody as an incentive for them to testify. Nor was it required to explain its failure to utilize other possible procedures. "[T]he purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. See also *United States* v. *Smith*, 519 F. 2d 516, 518 (C.A. 9); *United States* v. *Kirk*, 534 F. 2d 1262, 1274 (C.A. 8), certiorari denied, June 27, 1977 (No. 75-7001). Here, normal investigatory methods were followed and found to be insufficient. Others were not attempted because it was the opinion of the agent, based on considerable experience, that no benefit would be derived therefrom. The statutory requirements were thus satisfied.

Petitioners allege, however, that the decision in this case conflicts with the Ninth Circuit's decisions in *United States* v. *Kalustian*, 529 F. 2d 585, and *United States* v. *Spagnuolo*, 549 F. 2d 705. Petitioners recognize (Pet. 10) that the decision below is consistent with the generally prevailing interpretation of 18 U.S.C. 2518(1)(c). We acknowledge that the *Kalustian* panel in the Ninth Circuit appears to have interpreted that Section to require somewhat greater specificity in the supporting affidavits than has been required by other courts. But that opinion does not represent the consistent view of that circuit,[4] nor does *Spagnuolo* require even greater specificity than *Kalustian*, as petitioners suggest (Pet. 11). Instead, the court in *Spagnuolo* recognized that its circuit's decisions in this area "often lead to results difficult to harmonize" and tried "to promulgate a manageable standard by which to judge affidavits under 2518(1)(c)." 549 F. 2d at 709-710. The standard it adopted is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. * * * An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with section 2518(1)(c). *Kalustian* teaches no more than that." 549 F. 2d at 710. The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. Accordingly, even

[4]For example in *United States* v. *Pezzino*, 535 F. 2d 483 (C.A. 9), the Ninth Circuit held that an affidavit not unlike one here involved was sufficient. See also *United States* v. *Scully*, 546 F. 2d 255 (C.A. 9), certiorari denied, 430 U.S. 970; *United States* v. *Turner*, 528 F. 2d 143 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere,[5] this case does not directly present that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

[5]Since no other court of appeals has followed *Kalustian*, and since the Department of Justice has since *Kalustian* made efforts to conform its application to the stringent standards of that case (the present applications were submitted about a year before the *Kalustian* decision), we have not believed it justified to ask this Court to review those cases that we have lost in the Ninth Circuit on the basis of this issue. Moreover, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions from the Ninth Circuit and other circuits alleged to be in conflict with *Kalustian* (see, *e.g.*, *United States* v. *Scibelli*, 549 F. 2d 222 (C.A. 1), certiorari denied, June 6, 1977 (No. 76-1212); *United States* v. *Kirk*, *supra*; *United States* v. *Scully*, *supra*, and nothing has happened recently to justify any change in this Court's refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.